

Susan Silber
Linda S. Perlman
Kenneth T. Sigman
Metody A. Tilev*
Kirstin Gulling, *Of Counsel*
* Also admitted in Virginia



SILBER, PERLMAN,
SIGMAN & TILEV, P.A.

ATTORNEYS AT LAW

*Practicing in Maryland and
the District of Columbia*

Silber@SP-Law.com

7000 Carroll Avenue, Suite 200 ■ Takoma Park, Maryland 20912-4437 ■ Tel: (301) 891-2200 ■ Fax: (301) 891-2206 ■ Web: www.SP-Law.com

February 11, 2009

VIA OVERNIGHT MAIL

Letitia A. Thompson
Regional Administrator, Region III
Federal Transit Administration
U.S. Department of Transportation
1760 Market St.
Suite 500
Philadelphia, PA 19103-4124

Re: Joint Development Project Review of the Takoma Metro Station Development

Dear Ms. Thompson:

I am writing on behalf of the City of Takoma Park in response to the January 12, 2009, letter to you from Joel R. Washington, Director of Station Area Planning and Asset Management, of the Washington Metropolitan Area Transit Authority (WMATA), regarding the proposed sale of federally funded land at WMATA's Takoma Metro station. For the reasons detailed below, the City requests that you continue to forestall the FTA's consideration of WMATA's application until WMATA presents a final site plan or, if you consider WMATA's application, that you decline to approve it. Although the City recognizes that the revised site plan submitted by WMATA is an improvement over the previous plan in that it reduces the conflict between buses and private automobiles and pedestrians in the traffic circle, it does not address the majority of the shortcomings of the previous plan. In addition, in its cover letter, WMATA has mischaracterized or ignored most of the City's concerns about the EYA joint development project. Therefore, I have enclosed a copy of my September 18, 2008, letter opposing WMATA's application for your convenience.

The September 15, 2008, Site Plan is not a Final Site Plan.

In my letter of September 18, I urged the FTA to refrain from ruling on WMATA's application because the site plan submitted by WMATA was likely to undergo significant changes because it still had to undergo the District of Columbia Planned Unit Development (PUD) process. The City again urges you to refrain from ruling on the application because the revised plan also still must undergo the PUD process and it still does not comply with local planning regulations. Moreover, WMATA's submission of a new plan prepared by the developer and accepted by WMATA without formal action confirms the fluidity of the plan at this time.

In Attachment 3 to its letter, WMATA asserts that it is "unusual for there to be significant changes to the transit facilities" as a result of the PUD process. This indicates that some change to the transit facilities can be expected and significant changes to the transit facilities are possible as a result of the PUD process. In this case,

the proposed project deviates from the local planning legislation that governs the development of the site. WMATA claims that the plan “track[s] very closely” with the District of Columbia’s planning policy. While untrue, it constitutes an admission that the plan deviates from the policy in some respects. Those deviations include the following:

- The Central District Plan provides that residential developments at the Metro station should “promote transit use by minimizing development of parking spaces (encourage 1 to 1 unit/parking space ratio and on street parking).” Central District Plan at 53. The revised plan calls for the construction of townhouses with two car garages.
- The Central District Plan states that “[a] landscaped buffer of no less than fifty feet should be provided between the Metro station’s transit functions and existing residential uses, such as the multi-family structures to the north along Eastern Avenue.” Central District Plan at 52. The revised plan places an access road for buses and automobiles well within the required fifty-foot buffer.
- The Central District Plan calls for a station design that “enhance[s] the experience of arriving in the neighborhood,” recommends the installation of kiosks near the station entrance, and includes a proposed site plan that includes a large plaza at the main entrance to the station. Central District Plan at 49 and 54. The revised plan includes a narrow platform that fronts to a bus bay and is congested with bike racks and a bus shelter.

Therefore, in this case, the PUD process is likely to require significant changes to the plan, including the transit facilities. For your convenience, I have enclosed a copy of page 54 of the Central District Plan, which includes a conceptual site plan for the station that is consistent with the Plan. The stark contrast between the conceptual site plan and the revised plan submitted by WMATA makes clear that the site plan may undergo significant changes as a result of the District of Columbia planning process.

WMATA’s grandiose claim that requiring the developer to complete the PUD process before the FTA rules on the application would “impede joint development throughout the country” because developers will be unwilling to go through local planning processes without FTA approval has no merit and underscores the weakness of their argument based on the facts of this case. First, the decision to delay the FTA’s consideration of WMATA’s application in this case will not require that it do so in other cases. The timing of FTA’s review can and should be made on a case-by-case basis. Notably, in this case, FTA already decided to delay its consideration of the application until the WMATA Board approved the project. The City presumes that this change in practice has not established a precedent that FTA has applied to all subsequent joint development applications and has not impeded joint development around the country. As noted above, this project does not comport with local planning objectives. Therefore, the FTA should not expend resources considering a plan that is likely to undergo significant revision and may even be abandoned altogether.

Although not relevant to the FTA’s decision whether to refrain from considering the application until the completion of the PUD process, in the interest of protecting the City’s reputation, I must address WMATA’s assertion that the City acted in bad faith by withholding its suggested improvements until after the WMATA Board approved the site plan. Furthermore, the stark contrast between the documented facts and WMATA’s assertion raises questions about the credibility of any of WMATA’s assertions in its letter. Contrary to WMATA’s claim, both the City and Montgomery County, Maryland, suggested changes similar to those included in WMATA’s revised plan before the Board approved the previous plan on November 8, 2007.

First, Montgomery County Public Works and Transportation Director Arthur Holmes, Jr., recommended such changes in a letter to WMATA General Manager John Catoe, Jr., dated October 16, 2007. Second, City of Takoma Park Mayor Kathy Porter submitted the City’s alternative site plan to the WMATA Board on October 19, 2007, with an explanation of the alternative plan and a written comparison of the City’s plan and the

developer's plan (attached).

However, what makes WMATA's assertion that the City acted in bad faith so outrageous is the fact that the WMATA staff refused to review the City's alternative plan and, without any lawful basis, actively sought to prevent the WMATA Board from considering the City's alternative site plan. My letter of October 19, 2007, to the WMATA Board of Directors and General Manager (enclosed) documents WMATA staff's attempt to prevent the Board from considering the alternative plan and the absence of grounds to do so. Mr. Catoe's letter of November 5, 2007, to Mayor Porter (enclosed) confirms his refusal to present the alternative plan to the Board without citation to legal authority.

The Revised Plan Does Not Enhance the Effectiveness of the Takoma Station.

WMATA summarily asserts that the revised plan enhances the effectiveness of the Takoma Station because the construction of 77 townhouses will result in approximately 152 additional rail trips per week. WMATA does not address the fact that, unlike true transit oriented development, the proposed plan discourages residents from using public transit because the new residences are town houses with two car garages. In fact, the very study that WMATA relies upon for its estimates of ridership expressly concludes that the provision of two parking spaces per residential unit of transit oriented development results in lower trip generation than when only one parking space per unit is provided. Regarding the safety improvements claimed by WMATA, although the revised plan does include some pedestrian safety improvements in comparison with the prior plan, it does not improve pedestrian safety over existing conditions. In short, the negative aspects of WMATA's plan will reduce ridership to a greater extent than the construction of new townhouses will increase ridership.

With respect to parking for transit users, WMATA again asserts that the revised plan will provide 1:1 replacement of the existing spaces. However, WMATA ignores the pitfalls of the replacement of the existing 149 space parking lot, with a 123 space garage and street parking spaces scattered throughout the site. First, the construction of 82 town houses will create significant additional demand for parking at the station by the residents' guests, domestic employees, and service vehicles. In addition, by dispersing the short term transit user parking spaces throughout the development rather than in a single lot, the EYA project will force motorists to meander through the station in search of a parking space if the lot is full. Finally, by dispersing the park and ride spaces from their current location at the front of the existing parking lot, adjacent to the elevator entrance of the station, to several locations throughout the site, passengers and their drivers will not know where to find each other and are likely to walk or drive from one kiss and ride area to another in search of one another.

The Revised Plan Does Not Address the Shortcomings of the Plan for Disabled Patrons.

As I noted in my September 18 letter, currently there is a direct line of sight from the automobile drop-off point for disabled patrons to the elevator entrance to the station, which is located at the end of a 57-foot tunnel. The only claimed improvement in the revised plan regarding access to the elevator is that the plan now allows a direct sight line from Eastern Avenue to the elevator entrance of the station. First, this claim is inaccurate. The plan might provide a direct line of sight from Eastern Avenue to the *opening* of the tunnel if the trees, buses and bus shelter were not in the way, but certainly not within the tunnel. Second, the problem with both the previous plan and the revised plan is that persons picking up or dropping off disabled patrons at the designated drop off point in the parking garage will not be able to see the patrons as they walk the 57 feet through the tunnel to and from the elevator. Persons dropping off or picking up disabled patrons are unlikely to drop them off on Eastern Avenue, which is more than 800 feet from the entrance. Persons dropping off disabled patrons at the Kiss and Ride spaces will be on a one-way street where the passenger side of the vehicle is on the road side of the spaces. The disabled patron will then need to cross the two lanes of bus bays at the circle. Two bus bays and two bus shelters impede the view to the tunnel for these patrons.

The most convenient drop off point for patrons, especially disabled patrons, is from the circle near the elevator. While signs prohibiting car traffic may dissuade healthy patrons on sunny days from using the circle, it is likely that the clear convenience of using the circle may encourage persons dropping off patrons who are unable to walk long distances to violate the rules. And, on a rainy day, many people may choose to take the chance of using the circle. Certainly, they can be ticketed if transit police are present, but, in any event, car use of the circle will impede travel operations for the bus system. It is far better to design circulation paths that meet the desire lines of the drivers and pedestrians, rather than have facilities that meet the apparent desire lines and then post signs prohibiting their use.

WMATA claims that the revised site plan improves access to the station for disabled bus patrons. However, patrons with significant mobility impairment are unlikely to use bus service—rather they are likely to arrive at the station via paratransit van or private automobile. As WMATA concedes, the drop off point for these vehicles will be farther from the elevator entrance under the revised plan than under existing conditions.

One of the most significant problems for patrons who have mobility problems but do not use wheelchairs is the topography of the proposed smaller plaza at the main entrance. Because what has been submitted to WMATA is a concept plan, and not a true site plan, no contour lines are included on the drawings. If there were, the problems for patrons at the main entrance would be apparent. The smaller plaza will be characterized by more steps and steeper slopes at the entrance, in order to meet the much lower grade of Carroll Street as it goes into the underpass. The current large plaza allows for a gently sloping grade which can accommodate persons who have an unsteady gait. Mildly disabled patrons coming from Carroll Street or by bus from buses with bus bays near Carroll Street may need to take the long walk to the tunnel entrance and elevator in order to avoid the slope.

The Reduction in the Size of the Plaza in Front of the Main Entrance to the Station will Impede the Effectiveness of the Takoma Station.

The revised plan, like the previous plan, will create severe congestion at the main entrance to the rail station because it reduces the depth of the existing plaza in front of the main entrance by 56 feet, leaving little room between the turnstiles and the bus bays for patrons entering and exiting the station. Due to the change in slope (as mentioned above), more stairs and railings will be required, adding further congestion in the small space, especially along Carroll Street. The large plaza that now exists at the station is already crowded during the morning and evening rush hours. Common sense dictates that reducing the depth of the already crowded plaza by 56 feet will have an obvious and immediate impact on persons entering and exiting the train station, as well as persons waiting for the bus at the bay adjacent to the entrance to the train station. WMATA, however, chose not to address this issue.

Layover Parking Along the Median of the Bus Bays Creates Circulation Problems.

The revised plan keeps layover bus parking along the median of the bus bays. Unfortunately, this location causes two serious transportation problems. First, the width of the bus bay area is larger because of the layover spaces and this has driven the developer to reduce the pedestrian area near the main entrance, reducing pedestrian and disabled access to that entrance as described above. Second, layover parking along the median causes buses to enter the public roadways much more often, and encourages unsafe circulation patterns. The greatly increased use of the public roadways increases traffic congestion, wear and tear on the roadways, and fuel expense for the bus systems. With a circulation plan such as that proposed by the consultants retained by the City of Takoma Park, these problems are easily avoided.

Three examples illustrate the circulation problems triggered by the poor location of layover spaces. For these

examples, assume the bus bays are numbered from one to ten, starting at the entrance from Carroll Street (as labeled on WMATA's revised site plan), and the layover spaces are identified as A, B, C, and D, also starting from the entrance from Carroll Street.

Example 1: A bus enters the bus bay area from Carroll Street and uses bus bay 1 or 2 to discharge its passengers. Fortunately, layover space is available in space C or D and the bus stops there. Fifteen minutes later it needs to return to bus bay 1 or 2 to begin its next run. To get to the bus bay it must go through the circle and out to Eastern Avenue, then around to Cedar Street and Carroll Street to re-enter the bus bay.

Example 2: A bus enters the bus bay area from Carroll Street and uses bus bay 1 or 2 to discharge its passengers. Unfortunately, the only open layover space is available in space A. The bus proceeds through the circle and out to Eastern Avenue, then around to Cedar Street and Carroll Street to re-enter the bus bay. Fifteen minutes later it needs to return to bus bay 1 or 2 to begin its next run. To get to the bus bay it must go a second time through the circle and out to Eastern Avenue, then around to Cedar Street and Carroll Street to re-enter the bus bay.

Example 3: A bus enters the bus bay area from Carroll Street, goes around the circle and discharges its passengers at one of the bus bays numbered 6 through 10. It then needs to get to a layover space. To proceed in a safe manner, the bus would exit onto Carroll and proceed to Blair Road, Piney Branch Road, Eastern Avenue, Cedar Street and Carroll Street to re-enter the bus bay area. More likely, the bus driver would exit onto Carroll Street and make a "U" turn back into the bus bay area, which would be an unsafe maneuver.

The Joint Development Project Does Not Provide a Fair Share of Revenue for Public Transportation.

As discussed in my September 18 letter, Ryland Mitchell, an independent appraiser retained by the City of Takoma Park to review the appraisal report submitted by WMATA in support of its application, discovered a significant error in the methodology in the appraisal report. Mr. Mitchell, in a letter dated September 16, 2008 (enclosed), explained that all four Comparable Sales in the WMATA appraisal report involved sales from the land developer to a home builder, that the prices paid were negotiated prior to the developer obtaining the necessary government approvals, and that the home builders were not obligated to purchase the land if the necessary approvals were not obtained. This is, in essence, the same arrangement that EYA has with WMATA. If the FTA or the District of Columbia do not approve the EYA project, EYA is free to terminate the Sales Agreement. However, WMATA's appraisal report discounts the value of the WMATA property by more than 30% because the necessary government approvals have not been granted. Therefore, WMATA's appraisal report understates the value of the property by more than 30%. Assuming, for simplicity's sake, that WMATA's appraisal undervalues the property by just 30%, the correct appraised value of the property is \$8,500,000.00, which exceeds the \$7,350,000.00 gross price accepted by WMATA.¹

Even if the City had not apprised WMATA of the error in the appraisal report, one would expect that a 15% drop in the appraised value of the property—prime transit oriented land located in Washington, D.C.—would have raised a red flag for WMATA.² Remarkably, WMATA chose to ignore this issue. Therefore, WMATA has not

¹ These figures are based on the figures used by WMATA in Attachment 3 to its letter, which assumes the developer will construct 70 market rate townhouses.

² The enclosed Metropolitan Regional Information Systems Real Estate Trend Indicator reports indicate that, as of March 2008, the average sale price for residential properties in Washington, D.C., priced between \$100,000.00 and \$5,000,000.00 decreased by only 4.65%

conducted the “reasonable investigation” of the commercial reasonableness of this project as required by the FTA’s regulations. This alone mandates the disapproval of WMATA’s application.

Instead of investigating and either correcting or refuting the errors in its appraisal report, WMATA claims that, because the May 2008 appraisal it submitted with its application was lower than the previous appraisal, it is receiving a windfall. The fact that the developer, which is free to withdraw from the project at any time, is willing to proceed with the project at the agreed upon price despite a \$1 million drop in the appraised value and while absorbing significant additional costs as a result of the WMATA Board’s requirement that it construct a parking garage, provides strong evidence that WMATA’s appraisal understates the true value of the property.

Finally, although its relevance is unclear, WMATA asserts that it is bound by the density limits of the local planning regulations. WMATA fails to acknowledge, however, that it had already accepted EYA’s proposal to build townhouses on the property, and that WMATA itself was the driving force behind the District of Columbia’s “determination” that townhouses were the best use for the property.

WMATA Continues to Ignore the Requirement that it Submit the Hearing Transcript.

As I noted in my letter of September 18, 2008, Brian Glenn advised WMATA to submit the transcript of the WMATA Board of Directors’ Compact Hearing regarding the joint development project. WMATA, however, ignores this issue. The most likely explanation for WMATA’s decision to withhold the transcript is that 54 of the 59 persons that testified at the hearing opposed the joint development project. Those expressing opposition to the project included the City of Takoma Park Mayor and every member of the Takoma Park City Council, two District of Columbia Advisory Neighborhood Commissioners, Maryland State Senator Elect Jamin Raskin, Phil Alperson from the office of United States Congressman Chris Van Hollen, and Montgomery County Councilmember George Leventhal. Notably, no elected officials testified in support of the proposed joint development project.

For the foregoing reasons, and for the reasons set forth in my letter of September 18, 2008, most of which remain valid despite WMATA’s submission of a revised plan, the City of Takoma Park urges you to refrain from considering WMATA’s application until it has a final site plan, or, if you do rule on the application at this time, to disapprove the application. Thank you for your consideration of this matter.

Very truly yours,

Susan Silber
City Attorney
City of Takoma Park

Encl: September 18, 2008, letter from Silber to Thompson
District of Columbia Takoma Central District Plan, p. 54
October 19, 2007, letter from Silber to WMATA Board
October 19, 2007, letter from Porter to WMATA Board

from the previous year, and that residential properties priced between \$30,000.00 and \$500,000.00 increased by 6.85% over the same time period.

November 5, 2007, letter from Catoe to Porter
September 18, 2008, letter from Mitchell to Silber
MRIS reports

cc: Representative Chris Van Hollen
Representative Eleanor Holmes Norton
Senator Barbara Mikulski
Senator Ben Cardin
Maryland State Delegate Heather Mizeur
Maryland State Senator Jamin Raskin
Montgomery County Executive Isiah Leggett
Brian Glenn
Carol O'Keefe, General Counsel, WMATA

F:\TAKOMA\WMATA\FTA Review\LT 02-11-09.wpd